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In The

Supreme Court of the United States

October Term, 1991

F. DALE ROBERTSON, CHIEF, UNITED STATES FOREST SERVICE, THE UNITED STATES FOREST SERVICE, AND MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR,

Petitioners,

v.

SEATTLE AUDUBON SOCIETY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS SEATTLE AUDUBON SOCIETY, ET AL.

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QUESTION PRESENTED

Was the Ninth Circuit Court of Appeals correct in holding that section 318 (b)(6)(A) of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 101-121, Tit. III, § 318(b)(6)(A), 103 Stat. 747 (1989), violates the constitutional separation of powers by directing two federal district courts how to apply existing laws in two specifically named pending cases for one fiscal year?

PARTIES TO THE PROCEEDINGS

Respondents accept petitioners' description of the parties to the proceedings. All of the respondent plaintiffs in No. C89-160(WD) (W.D. Wash.) and all of the respondent plaintiffs in No. C87-1160-FR (D. Or.) are not-for-profit corporations and none of them has any parent companies, subsidiaries, or affiliates. This statement is provided pursuant to Supreme Court Rule 29.1.

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BRIEF OF RESPONDENTS SEATTLE AUDUBON SOCIETY, ET AL.

STATEMENT

This case requires the Court to determine whether the "extraordinary measures . . . with regard to judicial processes," H.R. Conf. Rep. No. 264, 101st Cong., 1st Sess. 87 (1989), contained in Section 318(b)(6)(A) of the Department of Interior and Related Agencies Appropriations Act for Fiscal Year 1990, Pub. L. No. 100-121, Tit. III, § 318, 103 Stat. 745-50 (1989), violate the Constitution's separation of powers.

These "extraordinary measures" were part of a last-minute amendment to an annual appropriations bill

included at the request of legislators from Oregon and Washington. The chief purpose of the amendment was to control the courts' adjudication of these cases and compel the sale of timber from U.S. Forest Service and Bureau of Land Management ("BLM") lands in Oregon and Washington.

The incursion Section 318 makes into the adjudicatory powers vested in the courts under Article III of the Constitution is apparent from the face of Section 318, the alternatives to Section 318 that Congress rejected, and the effects of Section 318 on the courts' ability to decide these cases.

BACKGROUND OF CASES

A. Administrative Actions And Initial Court Proceedings Underlying These Cases.

In the late 1980s, the Forest Service and BLM began to take steps to protect the northern spotted owl, a rare interior forest bird that depends on the remaining old-growth coniferous forests of western Oregon, Washington and northern California for its survival.[1] Section 1 sets forth the actions of the Forest Service, Section 2 those of the BLM.

1. Forest Service administrative actions and judicial review of these actions prior to Section 318.

The Forest Service first publicly adopted guidelines for managing spotted owl habitat in 1984 to meet the

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[1] For a discussion of the natural history, biology and management history of the northern spotted owl, *see* 55 Fed. Reg. 26114 (June 26, 1990) ("Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for Northern Spotted Owl; Final Rule").

biodiversity requirements of the National Forest Management Act ("NFMA"). 16 U.S.C. § 1604(g)(3)(B).[2] The agency also prepared an environmental impact statement ("EIS") pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, to accompany its guidelines for owl habitat and other forest management issues.[3]

The NFMA specifically directs the Forest Service to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area." 16 U.S.C. § 1604(g)(3)(B). The agency has implemented this "biodiversity" requirement through regulations directing that "fish and wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species. . . ." 36 C.F.R. § 219.19. "The duty to maintain viable populations of existing vertebrate species requires planning for the

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[2] Passage of the NFMA in 1976 fundamentally altered the Forest Service's historical mission of selling timber from the public lands. *See* Wilkinson, C. & Anderson, H., *Land and Resource Planning in the National Forests*, 64 Or. L. Rev. 1, 117 (1985). In the words of one of the NFMA's chief sponsors:

> The days have ended when the forests may be viewed only as trees and the trees viewed only as timber. The soil and the water, the grasses and the shrubs, the fish and the wildlife, and the beauty that is the forest must become integral parts of resource managers' thinking and actions.

122 Cong. Rec. 5619 (1976) (statement of Senator Humphrey).

[3] NEPA imposes on the Forest Service the procedural duty to fully consider and disclose the environmental consequences of and alternatives to any of its actions that may have significant environmental effects, including effects on wildlife such as the spotted owl. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-50 (1989); *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97-100 (1983).

entire biological community – not for one species alone." Br. Opp., App. at 49a (*Seattle Audubon Society v. Robertson*, C89-160WD, Order on Motions for Summary Judgment and for Dismissal (Mar. 7, 1991)). Thus, Forest Service has designated the northern spotted owl an "indicator species," *id.* at 50a, whose habitat the agency manages in order to protect other wildlife that also survives in similar habitat. *See* 36 C.F.R. § 219.19 (describing indicator species management).

Several environmental groups successfully pursued an administrative appeal of the 1984 Forest Service owl habitat guidelines and EIS, arguing that the guidelines did not meet the biodiversity requirements of the NFMA and that the EIS failed to disclose the environmental consequences to the owl from logging. J.A. at 65. In 1988, the agency issued new guidelines for owl habitat and a supplemental EIS. The new guidelines, like the 1984 guidelines protected suitable habitat around individual owls.[4] Environmental groups again asked

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[4] The inadequacy of the 1988 Forest Service guidelines to protect the owl, among other things, led the U.S. Fish and Wildlife Service ("FWS") in June of 1990 – while Section 318 was in effect – to list the owl as a "threatened" species under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* *See* 55 Fed. Reg. 26114 (June 26, 1990) ("Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Northern Spotted Owl; Final Rule). Several months before the FWS listed the owl as threatened, but also while Section 318 was in effect, an Interagency Scientific Committee ("ISC") concluded that the Forest Service and BLM actions challenged in these cases were "a prescription for the extinction of spotted owls, at least in a large proportion of the owl's range." *Seattle Audubon Society v. Robertson*, C89-160WD, Government's Exh. 1 (Hearing of April 30, 1991) at 39. The ISC proposed a new management program for the owl that would increase significantly the acreage of protected forests. The new plan would replace the Forest Service and BLM system of protecting only individual owl pairs

for an administrative review of these guidelines and the supplemental EIS, but the agency rejected this appeal. J.A. at 67.

In February of 1989, the Seattle Audubon Society and others ("SAS") filed one of these cases, *Seattle Audubon Society v. Robertson*, C89-160WD (W.D.Wash.) (hereinafter "*SAS*"), seeking judicial review of the Forest Service's 1988 owl guidelines and the accompanying supplemental EIS under the provisions of the Administrative Procedures Act, 5 U.S.C. §§ 702, 706 ("APA"). J.A. at 57. SAS asserted that the Forest Service owl guidelines violated the requirements of NFMA, NEPA and the Migratory Bird Treaty Act ("MBTA"), 16 U.S.C. § 703. *Id.*[5] In March of 1989, the district court preliminarily enjoined approximately 165 specific Forest Service timber sales for likely violations of NFMA and NEPA. J.A. at 14. The court also set an early trial date of June 13, 1989, for a final hearing in the case. *Id.* Following a stay of proceedings in May of

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in small preserves called "spotted owl habitat areas" or "SOHAs" with large forest reserves called "habitat conservation areas" or "HCAs" that protect up to 20 pairs of owls each. *Id.* at 23-30. To date, neither the Forest Service nor the BLM has adopted this proposed management plan. Br. Opp., App. at 26a (*Seattle Audubon Society v. Robertson*, C89-160WD, Memorandum Decision and Injunction (May 23, 1991)).

[5] The MBTA protects the spotted owl. 50 C.F.R. § 10.13. SAS alleged that the MBTA prohibited the killing or taking through habitat destruction of such protected species. The district court rejected this claim, *see* Br. Opp., App. at 59a (*Seattle Audubon Society v. Robertson*, No. C89-160WD, Order on Motions for Summary Judgment and for Dismissal (March 7, 1991)). SAS has appealed this ruling and the case is pending in the Ninth Circuit. *Seattle Audubon Society v. Robertson*, Ninth Cir. No. 91-35528 (argued and submitted Aug. 29, 1991).

1989, the court rescheduled a trial for November 13, 1989.[6]

Before the scheduled hearing date, Congress enacted Section 318 and, as explained below, the district court stopped all proceedings on plaintiffs' claims. *See infra* section C.

2. BLM administrative actions and judicial review of these actions prior to Section 318.

Between 1978 and 1983, BLM adopted timber management plans ("TMP"), accompanied by EISs for its five western Oregon districts. These plans embodied the BLM's version of the scheme for owl habitat management that the Forest Service used in its 1984 and 1988 guidelines. In 1986, under pressure from conservation organizations, BLM prepared an "environmental assessment," *see* 40 C.F.R. § 1501.3 & 1508.9 (environmental assessments), to review whether new scientific information regarding the spotted owl warranted a revision of the agency's TMPs and EISs. BLM concluded that no supplements were necessary.

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[6] In May of 1989 the Forest Service asked the district court for a stay of all proceedings while it took 30 to 60 days to develop new owl habitat guidelines. J.A. at 15. The Forest Service failed to produce the promised revised guidelines. Instead, in August of 1989, the agency asked the district court to release eleven specific timber sales from the preliminary injunction and stay orders. *Id.* at 16. The district court refused this request observing that it would lead to "the piecemeal dismantling of a preliminary injunction rather than . . . a final decision on the merits" and that the Forest Service had not produced the interim spotted owl protection promised. *Id.* at 16-17. The court subsequently dissolved its stay of proceedings, continued its preliminary injunction and set a trial date of November 13, 1989. *Id.*

In October of 1987, the Portland Audubon Society and others ("PAS") filed the second of these consolidated cases, *Portland Audubon Society v. Lujan*, C87-1160-FR (D.Or.) (hereinafter *"PAS"*), seeking review under the APA of the BLM's decision not to modify or supplement its existing TMPs and EISs. PAS alleged that the agency's actions violated the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 *et seq.*, NEPA, and the MBTA. J.A. at 42.[7] In April of 1988, the district court dismissed the complaint because of language directed at the case in an amendment to the Department of Interior and Related Agencies Appropriations Act for Fiscal Year

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[7] FLPMA, which is specifically applicable to the BLM, requires the agency to consider wildlife protection measures in managing its forests. Thus, FLPMA requires the BLM to manage its lands on the bases of multiple use and sustained yield. 43 U.S.C. § 1701(a)(7). The Act defines "multiple use" as management for recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values. 43 U.S.C. § 1702(c). The Ninth Circuit has ruled that FLPMA requires consideration by BLM of all of these multiple uses, including wildlife protection. *Headwaters, Inc. v. Bureau of Land Management*, 914 F.2d 1174, 1182 (9th Cir. 1990), *rehearing denied*, 940 F.2d 435 (9th Cir. 1991). NEPA, of course, requires the BLM to consider and disclose the environmental consequences of any action it takes that may have significant environmental effects. *See supra* note 3. PAS' claim under the MBTA paralleled that of SAS, *see supra*, note 5. The district court has dismissed this claim, Br. Opp., App. 101a (*Portland Audubon Society v. Lujan*, No. 87-1160-FR, Opinion (D.Or. May 8, 1991)). PAS has appealed and the appeal is pending. *Portland Audubon Society v. Lujan*, Ninth Cir. No. 91-35782 (argued and submitted Aug. 29, 1991). Plaintiffs' complaint also included a claim for a violation of the Oregon and California Lands Act, 43 U.S.C. § 1181. The district court has denied this claim, Br. Opp., App. at 96a-99a, and plaintiffs have not appealed.

1988, Sec. 314, Pub.L. No. 100-202, Tit. III, 101 Stat. 1329-254 (1987). J.A. at 2.[8]

In January of 1989, the court of appeals reversed the district court's dismissal of PAS' complaint and dissolved an injunction it had granted pending appeal. *Portland Audubon Society v. Hodel*, 866 F.2d 302 (9th Cir. 1989), *cert. denied*, 492 U.S. 911 (1989). Subsequently, after concluding that the BLM had violated NEPA by failing to supplement its existing environmental impact statements in light of new and likely credible information regarding the impacts of logging on the spotted owl, the district court again dismissed the case, based on the same appropriations act amendment it had relied on to dismiss the case before. *Portland Audubon Society v. Lujan*, 712 F.Supp. 1456 (D.Or. 1989).[9]

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[8] This appropriations rider provided in pertinent part:

> [T]he Forest Service, and the Bureau of Land Management under separate authority, may continue the management of lands within their jurisdiction under existing land and resource management plans pending completion of new plans. Nothing shall limit judicial review of particular activities on these lands: *Provided, however*, That there shall be no challenges to any existing plan on the sole basis that the plan in its entirety is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan. *Provided further*, That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

101 Stat. 1329-254. The validity and effect of this provision are not at issue here.

[9] The amendment, first enacted for fiscal year 1988, had been reenacted for fiscal year 1989 as well. *See* Department of Interior and Related Agencies Appropriations Act for Fiscal

In September of 1989, the court of appeals reversed the district court's second dismissal of PAS' claims under FLPMA and the MBTA but affirmed the dismissal of the NEPA claim. *Portland Audubon Society v. Lujan*, 884 F.2d 1233 (9th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990).

B. Section 318 Of The Department Of Interior And Related Agencies Appropriations Act For Fiscal Year 1990.

During the summer of 1989, the district courts' and court of appeals' rulings in these cases prompted protests from the Northwest timber industry.[10] Individual members of Congress from Washington and Oregon reacted by seeking to add an amendment to the annual appropriations act funding the Forest Service and the BLM in order to prevent these cases from interfering with any timber sales and compel the offer of both enjoined and prospective timber sales in spotted owl habitat during fiscal year 1990.[11] The Senate Appropriations Committee Report on

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Year 1989, Pub. L. No. 100-446, Tit. III, Sec. 314, 102 Stat. 1774, 1825-26 (1988).

[10] *See, e.g.*, Strycker, "Is the Industry Doomed or 'Crying Wolf'?" Eugene Register-Guard, May 28, 1989, at B1; Lancaster, "Spotted Owl Flies into Political Cross-fire," Wash. Post, June 21, 1989, at A21; Stein, "Loggers See Spotted Owl as a Harbinger of Doom," L.A. Times, July 14, 1989, at 1.

[11] These same members of Congress previously had added a number of amendments to annual appropriations acts to forestall judicial enforcement of the environmental laws that protect public forests in the Pacific Northwest. *See* Sher, V. & Hunting, C., *Eroding the Landscape, Eroding the Laws: Congressional Exemptions From Judicial Review of Environmental Laws*, 15 Harv. Envt'l L. Rev. 435 (1991) (providing a history of these appropriations act amendments).

the original version of Section 318 confirms that the rulings in these cases spurred Oregon and Washington legislators to take action:

> The need for this amendment arose from the interdiction of nearly 60 percent of the timber sales from public lands in Oregon and Washington. This interruption occurred as a result of court actions filed in U.S. district courts. . . . The Committee's immediate concern is the potential for considerable economic disruptions which are likely to occur if the injunctions remain in place.

S. Rep. No. 101-85, 101st Cong., 1st Sess. at 120 (July 25, 1989).

The central dispute in preparing the amendment was over how to remove the injunctions in these cases and control the disposition of the cases during the coming year. The original amendment, introduced by Senators Hatfield of Oregon and Adams of Washington, would have accomplished this goal by: (1) expressly repealing the laws at issue in these cases for a year; and (2) prohibiting the courts from issuing injunctive relief for any other violations of the law during this time. The final version of the amendment developed by a conference committee, however, took a different approach. Because the approach of the Senate amendment sparked vigorous objections in the House of Representatives, the revised amendment did not repeal the laws at issue in these cases but instead sought to directly control the disposition of these cases by instructing the courts how to interpret and apply the existing laws to Forest Service and BLM actions during fiscal 1990.[12]

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[12] Section 318, as an amendment to an appropriations bill, never received any congressional hearing, even though it raised

1. The Senate amendment.

On July 26, 1989, the Senate considered and passed a version of Section 318 that would have insulated fiscal year 1990 timber sales from challenge "notwithstanding any provision of law." 135 Cong. Rec. S8776 (daily ed. July 26, 1989) (setting forth amendment text) (reprinted as App. A hereto). The amendment also set a timber sale target, provided standards to assist in the selection of timber sales to meet the target, established advisory committees to comment on timber sale selection by each agency, and limited existing administrative appeal rights for timber sale decisions. App. A at 1a-4a.

Other provisions of the amendment allowed the parties to these cases to select from among the then enjoined timber sales those that would be released from the existing injunctions in return for statutory deferral of other enjoined sales during fiscal year 1990. *Id.* at 4a-5a. Subsection (h) of the amendment allowed the Forest Service and BLM to select *all* of the timber sales (including any enjoined sales if there was no agreement with the parties to these cases) necessary to meet the overall timber target

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controversial issues and affected the operation of several of the most significant national environmental laws. Likewise, no authorizing committees of Congress with jurisdiction over the affected federal agencies or the laws that govern them ever reviewed the amendment. Nor did either of the judiciary committees in Congress consider the amendment even though it directly affected the functions of the federal courts. Instead, the amendment first appeared in the Senate Interior Appropriations Subcommittee on July 24, 1989, and the Senate passed it on July 26th. A House-Senate Interior Appropriations Conference Committee revised the amendment with like speed over several days in September of 1989.

of the amendment. *Id.* at 5a-6a. The Senate amendment then provided that sales selected by these agencies

> shall be prepared, advertised, awarded and operated notwithstanding any provision of law that is a basis for any stay, restraining order or injunction issued in [*Seattle Audubon Society v. F. Dale Robertson*, C89-160WD, and *Portland Audubon Society v. Lujan*, 87-1160-FR].

Id. at 6a.

> The amendment also stipulated that:
> No restraining order, injunction, or void of sale shall be issued by any court of the United States in fiscal year 1990 with respect to any decision to prepare, advertise, offer, or award timber sales from the thirteen national forests in Oregon and Washington and public lands in western Oregon known to contain northern spotted owls.

Id. A technical amendment, added later, stated: "*Provided*, That the courts shall have authority to void a sale if it has been determined by a trial on the merits that such sale should not be awarded." *See* 135 Cong. Rec. S8791 (daily ed. July 26, 1989).[13]

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[13] The Senate debate on this amendment highlighted the central role that control of these cases played in shaping the amendment. Senator Leahy of Vermont, the Chair of the Agriculture Committee, the committee with jurisdiction over the Forest Service and the laws that govern it, and a member of the Judiciary Committee objected to the Senate amendment:

> the right of our citizens to seek redress of their grievances against governmental action before an impartial third party is a basic principle of our system of government.
>
> In the debate over the future of the ancient forests, a subtle but serious attempt to circumvent this right has developed.
>
> To achieve a temporary resolution to this long-term controversy, an amendment to limit the

2. The conference committee amendment.

Following passage in the Senate, the appropriations bill, including the Hatfield/Adams amendment, went to an appropriations conference committee to resolve differences between the Senate and House versions of the bill. Before this conference committee met to consider the bill, however, more than 100 members of the House sent a letter to Representative Sidney R. Yates, the Chairman of the House Interior Appropriations Subcommittee, expressing strong opposition to the provisions of the Hatfield/Adams amendment directed at insulating the Forest Service and BLM from the requirements of the laws at issue in these cases. *See* Letter of Sept. 11, 1989, to The Honorable Sidney R. Yates (reprinted as App. B hereto).[14]

> public's right to due process through the courts has been included in this legislation.

135 Cong. Rec. S8790 (daily ed. July 26, 1989). Senator Leahy ultimately did not offer an alternative amendment of his own because Senator Hatfield assured him that the Hatfield/Adams amendment was only a temporary measure and that "[t]he long-term solution is to jealously protect the existing laws unless, through oversight, those laws through the authorizing process, are determined to be amended." *Id.* (statement of Senator Hatfield). Senator Leahy also observed that "normally, every Senator, especially the senior Senator from Vermont, defers to the Senators from a State or region in matters relating to that region." *Id.* at S8789.

[14] These Representatives urged Chairman Yates and the conference committee to eliminate the Hatfield/Adams language from the final appropriations bill because it:

> effectively insulate[s] the Forest Service and the Bureau of Land Management from judicial remedies imposed under the Endangered Species Act, the National Forest Management Act, the National Environmental Policy Act, the Clean Water Act and any other federal law. This insulation is contrary to our

In response to the objections of so many House members, the conference committee re-wrote the crucial portions of the original Hatfield/Adams amendment directed at these cases and replaced them with subsection 318(b)(6)(A). The conference committee amendment thus did not directly "insulate the Forest Service and the Bureau of Land Management from . . . the Endangered Species Act, the National Forest Management Act, the National Environmental Policy Act, the Clean Water Act and any other federal law," *see* App. B, as subsection (h)(1) of the Senate amendment had. Instead, as the conference report on Section 318 states explicitly:

> [t]his section in no way alters application of the Endangered Species Act or other environmental laws to Forest Service and BLM management activities.

Br. Opp., App. at 122a.

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concept of justice because it will limit the ability of citizens to obtain judicial remedies to illegal agency activities.

The Hatfield/Adams amendment threatens to remove administrative decisions – no matter how illegal – from effective judicial remedies. In addition, this insulation of agency activities has not been subject to the scrutiny of the authorizing committees with appropriate jurisdiction over the management of our nation's forests and wildlife resources.

. . .

We therefore urge the conference committee to retain the relevant forestry sections of the House version of the Interior Appropriations Bill during the upcoming deliberations on this bill.

App. B. The House version of the bill did not address these cases in *any* way. H. Rep. No. 101-120 (to accompany H.R. 2788), 101st Cong., 1st Sess. (June 29, 1989).

Although the conferees reassured other members of Congress that the conference amendment had avoided the approach of the Senate amendment, the actual language of the conference amendment still compelled the offer of enjoined and prospective timber sales. It did so, however, by telling the courts in these cases how to interpret and apply the existing unchanged environmental laws for fiscal year 1990. The conference committee thus used legislation aimed at controlling the decisions of the courts in these cases to accomplish indirectly what it was unwilling to attempt to do directly because of opposition to repealing or amending the underlying laws.

3. The provisions of Section 318.

The provision of Section 318 that addresses the disposition of these cases for fiscal year 1990 begins by disclaiming any intention to decide permanently whether Forest Service and BLM administrative actions meet the requirements of the environmental laws. Pet. Br., App. at 5a. It then, however, decides this question in these cases for agency actions during fiscal year 1990 by

> determin[ing] and direct[ing] that management of areas according to subsections (b)(3) and (b)(5) of this section . . . is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al. v. F. Dale Robertson*, Civil No. 89-160 and *Washington Contract Loggers Assoc. et al. v. F. Dale Robertson*, Civil No. 89-99 (order granting preliminary injunction) and the case *Portland Audubon Society et al v. Manual Lujan, Jr.*, Civil No. 87-1160-FR.

Id. at 5a-6a. The new subsection concludes by attempting to remove completely from judicial review the statutory standards of sections 318(b)(3) and (b)(5). *Id.* at 6a.

Other parts of Section 318 retained a revised timber sale target from the Senate amendment, *id.* at 1a-2a, and replaced the Senate's criteria to assist the Forest Service and BLM in the selection of timber sales during fiscal year 1990 with the provisions of subsections (b)(1) through ~~(b)(5)~~.[15] *Id.* at 2a-5a. Two of these guidelines, subsections (b)(3) and (b)(5), place certain Forest Service and BLM lands that contain suitable spotted owl habitat off-limits to logging for a year.[16] The other provisions of

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[15] The conference committee also retained the Senate's creation of advisory committees, special reporting requirements, and called on the Forest Service to reconsider its owl management program. *See* Pet. Br., App. at 6a-7a, 12a. In addition, the conference committee wrote a new subsection (g) that allowed judicial review of timber sale decisions for any claim other than those decided in subsection (b)(6)(A), provided that the party seeking review filed its request within 15-days of the date on which the government advertised the timber for sale. *See id.* at 10a-12a. Finally, the conference committee retained the Senate mechanism for allowing the parties to these cases to select, with agency concurrence, the timber sales that the statute would release from the courts' injunctions. *See id.* at 9a-10a. This revised subsection (*f*) focused only on the Forest Service because by the time the conference committee met, there was no pending injunction in *Portland Audubon Society v. Lujan*. *See supra* at 8. The revised subsection (f) also addressed only enjoined timber sales that would have been sold in fiscal year 1989. It did not address any prospective fiscal year 1990 sales or attempt to direct the offer of such prospective sales "notwithstanding" contrary legal requirements as the Senate amendment had. *Compare* Section 318(f)(1)-(3), Pet. Br., App. at 9a-10a *with* App. A at 4a-6a (subsections (f), (g) and (h)(1)).

[16] For the Forest Service, these areas, their size, and their spacing are identified in subsections 318(b)(3)(A) through (F).

subsection (b) assist the Forest Service in selecting timber sales from the remaining national forest lands, including lands that contain owls and owl habitat. *Id.* at 2a-5a.

Apart from the direction to the courts in subsection 318(b)(6)(A), these guidelines complement the Forest Service and BLM's separate statutory duties under the laws at issue in these cases. Thus, while the Forest Service, for example, must stay out of the areas specified in subsection (b)(3), and must "minimize fragmentation" from timber sales in the "most ecologically significant old growth forest stands," *see* Pet. Br., App. at 2a-3a (§§ 318(b)(1) & (b)(2)), it still must determine whether the lands unaffected by timber sales, together with the lands placed off limits in subsection (b)(3) and other applicable laws, will assure the owl's continued viability. 36 C.F.R. § 219.19. Of course, the agency also must discuss and disclose the environmental consequences of and alternatives to the timber sales it selects as NEPA requires. Subsection (b)(6)(A), however, directs that, so long as Forest Service actions meet the subsection (b)(3) guidelines, the courts are to treat these actions as complying with the agency's separate and unchanged statutory duties under the NFMA and NEPA.

The appropriations bill that contained Section 318 passed the House on October 3, 1989, and the Senate on

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Pet. Br., App. at 3a-4a. Subsections (A) through (D) set the overall size of the areas while subsection (F), through its reference to the "standards and guidelines contained in the Chief's Record of Decision," sets the spacing of protected areas, type of habitat, and location and configuration requirements for the protected areas. *Id.*; *see also* J.A. 78-87 (Standard and Guidelines).

October 7, 1989.[17] On October 23, 1989, the President signed the bill, including Section 318, into law.

C. Judicial Proceedings After Passage Of Section 318.

Once Section 318 became law, both the Forest Service and the BLM asked the district courts in these cases to

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[17] Although many members of the congressional delegations from Oregon and Washington made floor statements in support of Section 318, there was no further debate on the amendment. Senator Biden, the Chairman of the Senate Judiciary Committee, however, during the Senate's consideration of the conference bill that contained the revised Hatfield/Adams amendment stated:

> [T]here is one aspect of the conference report that continues a disturbing trend of the past few years. That is the limitations on judicial review of environmental issues that have been included in recent Interior appropriations bills. The compromise reached by the conference may be viewed as an improvement over restrictions imposed in previous years, but it is still ad hoc meddling in established court procedures for dealing with environmental concerns.
>
> This is a habit Congress must break. Some may consider the conference agreement a victory because it moves in the right direction. I disagree. It continues a wrong-headed and potentially devastating practice of using legislation approved with no public review to undermine environmental laws that were developed through a lengthy public process.
>
> When economic concerns and environmental law conflict, the law should be reviewed, not circumvented. If it is unreasonable, it should be changed. If the law is simply the scapegoat for changing economic conditions, continuing to undermine it year after year does no one any good.

135 Cong. Rec. S12983 (daily ed. Oct. 7, 1989).

halt further proceedings, dissolve the existing injunctions, and dismiss the complaints. The district courts granted these requests. Following the court of appeals decision holding section 318(b)(6)(A) unconstitutional, however, the district court in one of these cases, *Seattle Audubon Society v. Robertson* ("*SAS*"), ruled that sixteen Forest Service timber sales in spotted owl habitat violated the NFMA and NEPA.

On November 7, 1989, the district court in *SAS* issued a brief ruling upholding Section 318 as constitutional and canceling the pending trial date. Pet. App. 29a-34a. The court followed this order with a memorandum opinion regarding the constitutionality of Section 318 in which the court concluded that "[s]ection 318 can and must be read as a temporary modification of the environmental laws." Pet. App. 25a.[18]

In *Portland Audubon Society v. Lujan* ("*PAS*"), the government moved to dismiss the case as moot in light of the provisions of Section 318 and the agency's then current plans to complete new timber management plans and EISs by the end of fiscal year 1990. J.A. at 8. The district court granted the government's motion and dismissed PAS' complaint for a third time. *Id.* at 8-9. The court adopted the constitutional analysis of Section 318 in the district court's opinion in the *SAS* case. Pet. App. 38a-40a.

SAS and PAS appealed both decisions and, in September of 1990, the court of appeals ruled that section 318(b)(6)(A)

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[18] The court also determined that it would not dismiss the case but would retain jurisdiction so that, with respect to individual timber sales challenged under section 318(g), "the parties [could] proceed by motion in these cases rather than having to start a new lawsuit." Pet. App. 28a.

> [did] not establish new law, but direct[ed] the courts to reach a specific result and make certain factual findings under existing law in connection with two cases pending in federal court. This is what [*United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871)] and subsequent cases agree is constitutionally proscribed.

Pet. App. 14a. Although the court recognized that it "must uphold a statute if 'it is fairly possible to interpret the [challenged] statute in a manner that renders it constitutionally valid,' " *id.* at 15a (citations omitted), the court concluded that the "language of section 318 is clear" and, even though "Congress could possibly have written a valid statute[,] [that] does not mean that we can 'fairly' interpret the statute . . . Congress in fact enacted as constitutionally valid." *Id.* at 15a-16a. Accordingly, the court of appeals held that "[t]he first sentence of subsection (b)(6)(A) violates the separation of powers doctrine." *Id.* at 17a.[19]

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[19] In July of 1990 in a case unrelated to either of these cases, the timber industry sued the Forest Service seeking a writ of mandamus to compel the agency to sell the quantity of timber specified in Section 318(a)(1). The district court denied the writ concluding specifically that subsection (a)(1) only set a timber sale "mark" or target that the Forest Service and BLM were to attempt to achieve consistent with other legal requirements:

> The prediction of the Forest Service that it will not be able to meet the level of sale of timber set by Congress [in section 318(a)] does not allow the court to order the Forest Service to sell timber which the agency has determined to be inconsistent with the requirement of its duty under the law. The Forest Service's determination that it cannot meet the 7.7 [billion board feet] timber sales level and at the same time meet the requirements of all of the provisions of section 318

Immediately after the court of appeals ruling, SAS asked the district court in *Seattle Audubon Society v. Robertson* to enjoin twelve Forest Service timber sales offered under Section 318 for violations of the environmental laws at issue in these cases. SAS challenged these sales within fifteen days of advertisement as section 318(g)(1) requires. The district court granted SAS' request, ruling that:

> [T]he NFMA and its implementing regulations require that the Forest Service provide for diversity of plant and animal communities [and] [p]opulation viability of native vertebrate species. . . . NEPA and its implementing regulations direct procedures to insure that public officials are provided reasonable alternatives before decisions are made or actions are taken.
>
> . . .
>
> The agency has not shown that these other requirements have been met.

Br. Opp., App. at 140a.[20]

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and all other applicable laws is entitled to deference at this point in time.

Gifford Pinchot Alliance v. Butruille, 742 F.Supp. 1077, 1083 (D.Or. 1990) (action for mandamus during fiscal year 1990 to compel sale of additional timber under section 318); *see also Gifford Pinchot Alliance v. Butruille*, 752 F.Supp. 967 (D. Or. 1990) (same conclusion).

[20] SAS also challenged six additional Section 318 timber sales for violations of NFMA, NEPA and the MBTA outside the fifteen-day limitation period of section 318(g)(1). Following a ruling by the Ninth Circuit that the limitations period was tolled for these sales while section 318(b)(6)(A) was in effect, *see Seattle Audubon Society v. Robertson*, 931 F.2d 590 (9th Cir. 1991), the district court enjoined four of the sales that had not been logged. Br. Opp., App. at 85a-88a.

As all of these proceedings make clear, Congress directed section 318(b)(6)(A) only at the courts' ability to decide the specific claims in these cases during fiscal year 1990.[21] The Section – as the conference report states – did not repeal the application of the existing environmental laws to the Forest Service or the BLM, nor did it occupy the field that these statutes regulate, even for a year.

SUMMARY OF ARGUMENT

In Section 318 Congress attempted to direct the courts to resolve these cases in favor of the government

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[21] In separate proceedings, on September 28, 1990, the Forest Service vacated the spotted owl guidelines that had been the model for some of the provisions of Section 318. *See* 55 Fed. Reg. 40413 (October 3, 1990). In place of the old plan, the agency announced an interim approach to managing suitable northern spotted owl habitat. *Id.* SAS amended its complaint to challenge this new agency action for violations of NFMA, NEPA and the MBTA. *See* Br. Opp., App. at 39a-40a (Order on Motions for Summary Judgment and For Dismissal). On March 7, 1991, the district court ruled that the new Forest Service administrative plan violated NFMA, *id.* at 64a, and on May 23, 1991, following an eight-day hearing, the court permanently enjoined the Forest Service from selling additional timber sales in owl habitat until the agency complies with the law, *see* Br. Opp., App. at 36a-37a (Memorandum Decision and Injunction). The Forest Service and timber industry have appealed these separate rulings and the appeals are pending in the Court of Appeals. *Seattle Audubon Society v. Robertson*, Ninth Cir. Nos. 91-35529, 91-35563 & 91-35782.

Following the end of fiscal year of 1990, PAS also asked the district court to enjoin certain BLM timber sales in spotted owl habitat. The district court, however, again dismissed PAS' complaint. *See* Br. Opp., App. at 88a-104a. PAS has appealed this dismissal and is awaiting a decision from the court of appeals. *Portland Audubon Society v. Lujan*, Ninth Cir. Nos. 91-35002 and 91-35992 (argued and submitted Aug. 29, 1991).

for fiscal year 1990. In doing so, Congress usurped the adjudicative function of the courts. Article III of the Constitution and the separation of powers principle articulated in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), and other decisions of this Court, forbid Congress from exercising such judicial powers.

The Constitution allocates the power to decide particular cases to an independent judiciary. The framers of the Constitution separated the legislative and judicial powers because they were acutely aware of the dangers posed by a legislature that could sit in judgment on individual cases. The decisions of this Court have jealously guarded this delegation of power to the courts to decide particular cases. *See* Section I.

The provisions of section 318(b)(6)(A) violate the separation of powers precisely because they seek to instruct the courts how to adjudicate specific pending cases. The statute says plainly "Congress determines and directs" that the courts are to consider certain Forest Service and BLM actions "adequate . . . for the purpose of meeting the statutory requirements that are the basis for" the claims in these cases. Congress made it clear both in the conference report on Section 318, and by its rejection of alternative language in the Senate bill, that this direction to the courts did not repeal or amend the existing environmental laws. Rather than change the legal requirements of the underlying laws, Congress simply told the courts how to rule in these cases. *See* Section II.

There could hardly be a clearer congressional direction to the courts to resolve a pending case in a certain way. Congress enacted a last-minute appropriations rider directing the courts to interpret and apply the law in these cases in favor of the government as a politically

convenient measure. In this way, Congress "passed the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. (13 Wall.) at 146-47.

ARGUMENT

I. THE CONSTITUTIONAL SEPARATION OF POWERS PREVENTS CONGRESS FROM EXERCISING AN ADJUDICATIVE ROLE IN PARTICULAR CASES

"Time and again" this Court has affirmed "the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches." *Morrison v. Olson*, 487 U.S. 654, 693 (1988). The framers of the Constitution created this separation of powers because they recognized that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointive, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47 at 324 (J. Cooke ed. 1961) (J. Madison).[22] This "system of separated

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[22] This recognition was grounded in immediate experience. During the Confederation of States that preceded the constitutional convention:

> The supremacy of the legislatures came to be recognized as the supremacy of factions and the tyranny of shifting majorities. The legislatures confiscated property, erected paper money schemes, [and] suspended the ordinary means of collecting debts.

Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 369, 374-75 (1976). "One abuse that was prevalent during the Confederation was the exercise of judicial power by the state legislatures." *INS v. Chadha*, 462 U.S. 919, 961-63 (1983) (Powell, J., concurring) (noting contemporaneous records of legislatures exercising the judicial power).

powers and checks and balances [is] 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of another.' " *Morrison*, 487 U.S. at 693 (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

Where, as here, the separation of powers between the judicial and legislative branches of the government is at issue, the starting point for analysis is the explicit allocation of governmental powers in the Constitution. Article III, §§ 1 and 2 vest the judicial power in the Supreme Court and the lower federal courts and provide that this power shall extend "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties. . . . " Article I of the Constitution vests "[a]ll legislative powers herein granted . . . in the Congress of the United States. . . . " Under this separation of powers, as petitioners concede, Article III "has an important role to play in determining Congress' ability to affect pending litigation. [It] protects against invasion of the adjudicative function." Pet. Br. at 36.

A. The Constitution Vests In The Courts The Power To Interpret And Apply The Law In Order To Decide Particular Cases.

Two early decisions of this Court, *State of Pennsylvania v. The Wheeling and Belmont Bridge Company*, 59 U.S. (18 How.) 421 (1855), and *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), establish the limits the Constitution imposes on Congress' ability to direct the courts' interpretation and application of the law to the facts in particular pending cases.

In *Wheeling Bridge*, the Court previously had ruled two bridges over the Ohio River were an obstruction to navigation under the existing laws that regulated navigation. 59 U.S. (18 How.) at 429. Subsequently, Congress

enacted a law designating the bridges "post-roads for the passage of the mails of the United States" and authorized the Wheeling and Belmont Bridge Company "to have and maintain their said bridges at their present site and elevation." *Id.* Congress also declared that the bridges were "lawful structures, in their present positions and elevations, and shall be so held and taken to be, any thing in any law or laws of the United States to the contrary notwithstanding." *Id.*

This Court concluded that the new law making the bridges post roads changed the substantive law governing interstate commerce and the bridges. *Id.* at 30. Under the new law, the Court's prior ruling regarding the bridges no longer applied:

> So far, therefore, as this bridge created an obstruction to the free navigation of the river, in view of the previous acts of congress, they are to be regarded as modified by this subsequent legislation; and although [the bridge] still may be an obstruction in fact, [it] is not so in the contemplation of the law.

Id.

Justice McLean, in dissent, urged that the new law could not be given effect because in it Congress had exercised the judicial power of deciding a particular case in violation of the separation of powers:

> The judicial power is exercised in the decision of cases; the legislative, in making general regulations by the enactment of laws. The latter acts from considerations of public policy; the former by the pleadings and evidence in a case. . . . The act declared the bridge to be a legal structure, and, consequently, that it was not a nuisance. Now, is this a legislative or a judicial act?

Id. at 440 (McLean, J., dissenting). The majority rejected this view, *not* because it found Congress had permissibly

exercised an adjudicative function in the case, but because Congress had legislated to change the governing substantive law:

> [S]ince the decree [of the Court], this right [of navigation] has been modified by the competent authority, so that the bridge is no longer an unlawful obstruction.

Id. at 432.[23]

The Court's decision fifteen years later in *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), makes this separation of powers analysis explicit. In *Klein*, plaintiff made a claim for money due from the government based on receipt of a pardon (which included the restoration of all property seized during the Civil War). *See United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542-43 (1869) (holding that receipt of a Presidential pardon established conclusive proof of loyalty and entitled the recipient to return of his property). Congress, however, added an amendment to an appropriations act, "with perhaps little consideration in either House of Congress," *Klein*, 80 U.S. at 143, to address the result in *Padelford* and the pending *Klein* case.

> The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it, both in the Court of Claims and in this court on appeal.

Id. at 144.

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[23] The Court in *Wheeling Bridge* recognized that there are limits on Congress' ability to affect the outcome of a pending case even by changing the applicable law. Thus, the Court noted that, to the extent the Court previously had determined the property and other rights of individuals, Congress could not change these by amending the governing law. 59 U.S. (18 How.) at 431.

The Court found this law unconstitutional because in it "Congress . . . inadvertently passed the limit which separates the legislative from the judicial power." *Id.* at 147. The Court reached this conclusion only after carefully distinguishing *Wheeling Bridge*:

> No arbitrary rule of decision was prescribed in that case, but the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

Klein, 80 U.S. at 146-47.[24]

Klein and *Wheeling Bridge* thus stand for the straightforward proposition that Congress cannot direct the outcome of a particular pending case by instructing the courts how to

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[24] The *Klein* Court also offered as an alternative holding the observation that "[t]he rule prescribed is *also* liable to just exception as impairing the effect of a pardon." 80 U.S. at 147 (emphasis added); *see also* L. Tribe, *American Constitutional Law* § 3-5 at 50 & n. 34 (2d ed. 1988)(noting that the discussion of the pardon power in *Klein* is an alternate holding in the case). Neither the Court's discussion of the pardon power nor its discussion of the potentially manipulative effects of the law on the courts' jurisdiction to protect that power address the "limit which separates the legislative from the judicial power," *Klein*, 80 U.S. at 147, the Court's principle basis for invalidating the appropriations amendment.

interpret and apply the existing law to the specific pending claims.[25] Such an effort involves Congress in the

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[25] None of the other decisions of this Court that address *Klein* offers a conflicting interpretation of the case, *see* Pet. Br. at 44 & n. 40, 45 & n. 44 (citing cases). Indeed, the Court's decision in *Hart v. United States*, 118 U.S. 62, 66 (1886), actually confirms the separation of powers analysis in *Klein*. There, in addressing the effect of contemporaneous legislation and pardons on claims against the United States, the Court agreed that the legislation at issue in *Hart* "did not . . . attempt to prescribe to the judiciary the effect to be given to a pardon." *Id.* at 66. The Court then observed:

> [W]e do not depart, in the least, from what was held, on the subject of pardons, in . . . *United States v. Klein*, [80 U.S.] 13 Wall. 128 [(1871)] . . . . If the joint resolution had said nothing on the subject of a pardon, no pardon could have had the effect to authorize the payment out of a general appropriation, of a debt which a law of Congress had said should not be paid out of it. The pardon cannot have such effect ascribed to it [that is, to authorize a payment] merely because the joint resolution says that it shall not have such effect.

Id. at 67 (citations omitted). Thus the law at issue in *Hart* did not attempt to direct the judiciary how to decide a case under an existing but unchanged law as the statute did in *Klein*; instead, the joint resolution in *Hart* merely prohibited the payment of certain classes of claims against the United States, regardless of whether the claimant had received a pardon from the President.

Carlisle v. United States, 83 U.S. (16 Wall.) 147, 152 (1872), likewise neither narrowed the holding of *Klein* nor eschewed the basic principle that Congress cannot direct the judiciary how to apply a particular existing law in a particular pending case without changing the underlying law. Instead, in that case, the Court gave to the pardon at issue exactly the effect it adjudged the pardon to have in light of the earlier decisions in *Padelford* and *Klein*. *Id.* at 151-56.

adjudication of cases under Article III, a role forbidden to it by the separation of powers.[26]

B. The Separation Of Powers Doctrine Independently Protects The Courts' Adjudicative Role From Congressional Interference.

Although petitioners acknowledge that Article III and the separation of powers prevent Congress from usurping the courts' adjudicative function in particular cases, Pet. Br. at 36, petitioners also urge that only specific constitutional limitations, and not the Constitution's separation of powers, restrict the legislature's ability to direct the outcome of a pending case, *id.* at 34-37. In petitioners' view, Pet. Br. at 34-37, so long as a statute does not violate one of these explicit constitutional provisions, and Congress acts pursuant to one of its enumerated powers, Congress cannot

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Similarly, the more recent case of *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (plurality opinion), does not undercut the basic separation of powers analysis in *Klein* for the simple reason that the Court's concern in *Glidden* was to determine whether the Court of Claims is an Article III court, *id.* at 531-34, not to define the reach of Congress' powers to affect specific pending cases. The opinion in *United States v. Sioux Nation of Indians*, 448 U.S. 371, 404-405 (1980), also does not address *Klein* directly because there, as the Court noted, the statute did not attempt to direct the courts how to apply an existing law to a particular case without changing that law; instead, in *Sioux Nation* Congress "waived the defense of res judicata so that a legal claim could be resolved on the merits." *Id.* at 406 (emphasis added).

[26] This conclusion respects and upholds one of the central concerns that led the framers of the Constitution to separate the judicial and legislative powers into independent branches of government – the desire to avoid any potential abuse of power through "trial by legislature." *United States v. Brown*, 381 U.S. 437, 442 (1965) (quoted in *INS v. Chadha*, 462 U.S. at 962 (Powell, J., concurring)).

"pass[ ] the limit which separates the legislative from the judicial power." *Klein*, 80 U.S. (13 Wall.) at 147. There are several reasons that this effort to limit the separation of powers should be rejected.

First, allowing Congress to exercise Article III powers except where such an exercise violates an independent constitutional limitation would eliminate the separation of powers protection of the courts' adjudicative function from any case that did not also raise other constitutional issues. If a Congressional enactment is an exercise of the "judicial Power" in a particular case, however, the statute violates Article III and the separation of powers doctrine whether or not the violation is accompanied by a separate constitutional defect. For this reason, Article III and the separation of powers stand as independent limits on Congress' ability to legislate a decision in a particular case. *Cf. Metropolitan Washington Airports Authority v. Citizens for the Abatement of Airport Noise Inc.*, ___ U.S. ___, 111 S. Ct. 2298 (1991) (striking down a law for a violation of the separation of powers between the legislative and executive branches even though the law did not violate any other constitutional requirement); *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928) (same).

Second, as this Court recently stated in applying the separation of powers to legislation, the actions of Congress are not immune to the constraints of the doctrine simply because Congress acts pursuant to one of its broad enumerated powers. *See Metropolitan Washington Airports Authority*, ___ U.S. at ___, 111 S. Ct. at 2309. Indeed, the Court in *Metropolitan Washington Airport Authority* agreed that there was in that case

> no question about the federal power [under the Property Clause] to operate the airports. The question is whether the maintenance of federal control over the airports by means of the Board

> of Review . . . is invalid . . . because Congress' continued control violates the separation of powers principle . . . .

Id. at 2309. Here too, the fact that Congress may have broad authority under the Property Clause to legislate general standards for management of the national forests and BLM lands does not allow Congress to decide these cases by invading the judicial power reserved to the courts in Article III.

Accordingly, the central issue in these cases is whether section 318(b)(6)(A) usurps the adjudicative power of the courts by directing the courts how to interpret and apply the existing law in order to achieve a particular result.

II. CONGRESS ATTEMPTED IN SECTION 318(b)(6)(A) TO DIRECT THE COURTS TO RESOLVE THESE CASES IN FAVOR OF THE GOVERNMENT FOR FISCAL YEAR 1990

Petitioners ask the Court to overlook Article III and the separation of powers by finding that section 318(b)(6)(A) merely repealed the laws at issue in these cases and did not dictate how the courts should apply these laws. *See* Pet. Br. at 20-31. Petitioners, however, ignore what Congress actually did, as well as what it chose not to do, in Section 318.

A. Section 318(b)(6)(A) Attempts To Determine The Application Of The Existing Laws By Directing The Courts To Decide These Cases For The Government

Section 318(b)(6)(A) sets forth its effect on these cases during fiscal year 1990 in unambiguous terms:

> Congress hereby determines and directs that management of areas according to subsections (b)(3) and (b)(5) of this section on the thirteen national forests in Oregon and Washington and Bureau of Land Management lands in western Oregon known to contain spotted owls is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned *Seattle Audubon Society et al. v. F. Dale Robertson*, Civil No. 89-160 and *Washington Contract Loggers Assoc. et al. v. F. Dale Robertson*, Civil No. 89-99 (order granting preliminary injunction) and the case *Portland Audubon Society et al. v. Manual Lujan, Jr.*, Civil No. 87-1160-FR.

Pet. Br. App. 5a-6a. The plain meaning of this language is that, for fiscal year 1990, Congress "directs" the courts to conclude that Forest Service and BLM actions which meet the guidelines of subsections (b)(3) and (b)(5) also "meet[ ]" the requirements of the existing laws at issue in these cases – that such actions are "adequate consideration for the purpose of meeting the statutory requirements that are the basis for" the claims in these cases.[27]

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[27] It would do more than strain the plain meaning of the phrase "meet[ ] the statutory requirements" in (b)(6)(A) to conclude that this language actually says "repeal the statutory requirements" – it would re-write the law altogether. "[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of . . . judicially rewriting it." *Heckler v. Mathews*, 465 U.S. 728, 741-42 (1984); *see Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964) ("this Court will not consider the abstract question of whether Congress might have enacted a valid statute but instead must ask whether the statute that Congress did enact will permissibly bear a construction . . . free from constitutional defects"). In plain language, to "meet" a

The specific reference in subsection (b)(6)(A) to the "order granting preliminary injunction" in the *Seattle Audubon Society v. Robertson* case explicitly shows that Congress was directing the subsection at the courts, not some other branch of government.[28] In this way Congress sought to control the disposition of these particular cases for fiscal year 1990.

The disclaimer that precedes these instructions to the courts confirms both that Congress did not seek to control the disposition of these cases *after* fiscal year 1990 and that it *did* intend to control the outcome of these cases *during* the fiscal year. The Conference Report on the section makes this point explicit:

> The legal adequacy of and the prohibition against judicial review of the SOHA framework established in this section should not be construed to moot *future action after fiscal year 1990* in the *Seattle Audubon Society/Washington Contract Loggers Association v. Robertson* cases . . . .

Br. Opp., App. at 120a (emphasis added).

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requirement is to accept it and comply, not to reject it or set it aside in favor of some other standard. The plain language of subsection (b)(6)(A) speaks of "meeting . . . statutory requirements."

[28] Petitioners suggest that Congress' use of the word "direct" in subsection (b)(6)(A) is aimed at the Forest Service and BLM, Pet. Br. at 30. The legislative history of Section 318 directly refutes this suggestion. It provides, "[t]his section in no way alters application of the Endangered Species Act or other environmental laws to Forest Service and BLM management activities." Br. Opp., App at 122a. Moreover, only "direction" to the courts could control the outcome of these cases for a year since the courts actively were considering what agency actions would meet the requirements of the existing environmental laws.

The last sentence of subsection (b)(6)(A) also shows that Congress' instruction to the courts in the *first* sentence of the subsection attempts to control the outcome of these cases for a year. This sentence says: "The guidelines adopted by subsections (b)(3) and (b)(5) of this section shall not be subject to judicial review by any court of the United States." By its own terms, this sentence removes from judicial review *only* a statute – sections 318(b)(3) and (b)(5) – and not agency actions. These statutory provisions do no more than place certain areas of the national forests and BLM lands off-limits to logging during fiscal year 1990. *See* Pet. App. at 3a-5a. The last sentence of subsection (b)(6)(A) does *nothing* to alter the underlying environmental statutes in these cases or to alter the underlying statute authorizing judicial review of Forest Service and BLM activities (the APA). In short, the last sentence of subsection (b)(6)(A) shows that Congress did not alter the generally applicable environmental and judicial review statutes involved in these cases.[29]

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[29] Petitioners attempt to argue that the last sentence of subsection (b)(6)(A) somehow precludes judicial review of plaintiffs' claims under the existing laws against Forest Service and BLM actions. Petitioners thus assert that the court of appeals failed to heed the last sentence of subsection (b)(6)(A) and found that federal agency actions taken to follow the statutory guidelines "may be rejected [ ] *because the guidelines . . . are not sufficient to comply with other statutes.*" Pet. Br. at 23 (emphasis added). But petitioners confuse judicial review of *agency actions* with the limited review courts might perform of a *statute*, such as the subsection (b)(3) and (b)(5) guidelines. The court of appeals did not make this mistake. Courts do not review a federal statute to decide whether it complies with another statute. Courts do, however, review agency actions to decide whether they comply with whatever statutory standards are applicable. 5 U.S.C. §§ 702, 706 (APA review of agency

As the court of appeals correctly concluded, the plain language of the first sentence of subsection (b)(6)(A) – the only language that affects the disposition of these cases during fiscal 1990 – "directs the court to reach a specific result" in these cases for the year. Pet. App. 14a.

B. Section 318 Does Not Repeal Or Replace The Laws That Form The Bases Of The Claims In These Cases.

Petitioners attempt to avoid the separation of powers concerns that Section 318 raises by arguing that the section provides a "temporary modification of statutory requirements," rather than directing the courts how to resolve these cases. Pet. Br. at 20. Petitioners, however, completely ignore this Court's well-established rules for analyzing whether one statute "modifies" another. Applying these rules demonstrates that petitioners are wrong.[30]

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actions). The court of appeals simply concluded that nothing in the section 318 guidelines (other than Congress' determination that compliance with (b)(3) and (b)(5) would be "adequate consideration") barred the courts from deciding whether Forest Service and BLM actions during fiscal year 1990 complied with the requirements of the existing laws. Pet. App. at 13a.

Since no one has ever asked the courts to review in any way, let alone invalidate, the subsection (b)(3) and (b)(5) guidelines themselves, or argued that the Forest Service did not need to comply with them, the court of appeals properly "expressed no opinion on the second and final sentence of subsection (b)(6)(A)," Pet. App. 17a & n. 4, which, by its terms, seeks to insulate only these *statutory* standards from judicial examination.

[30] Where, as here, the language of one statute regulates conduct that other statutes also regulate, this Court has long made clear that

> the courts are not at liberty to pick and choose among congressional enactments, and when two statutes are

Section 318 contains no express repeal of any existing laws that governed Forest Service and BLM timber sales during fiscal year 1990 – with or without the clause struck down by the court of appeals. Indeed, Congress explicitly confirmed in the conference report that Section 318 did not alter the application of the environmental laws to the Forest Service or BLM for fiscal year 1990, and

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> capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

Traynor v. Turnage, 485 U.S. 535, 548 (1988); *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n*, 491 U.S. 490, 510 (1989); *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The Court must first determine whether the new statute expressly repeals or modifies preexisting law; where, as here, there is no clear language of repeal in either the text or legislative history, there can be no express repeal. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1017 (1984) (no express repeal where neither text nor legislative history discussed relation between statutes); *Blanchette v. Connecticut General Ins. Corp. (Regional Rail Reorganization Act Cases)*, 419 U.S. 102, 133 (1974) (same).

If there is no express repeal, the Court must determine whether there has been an implied repeal. However, here petitioners "encounter head-on the 'cardinal rule . . . that repeals by implication are not favored.' " *Morton, supra*, 417 U.S. at 549; *see Traynor v. Turnage, supra*, 485 U.S. at 547. This policy, moreover, applies "with even *greater* force when the claimed repeal rests solely on an Appropriations Act." *TVA v. Hill*, 437 U.S. 153, 190 (1978) (emphasis in original). An implied repeal exists only "when the earlier and later statutes are irreconcilable," *Morton*, 417 U.S. at 550. "When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest.' " *Id.*; *cf. Flint Ridge Devel. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976) (NEPA applies to all federal actions unless "a clear and unavoidable conflict in statutory authority exists," that creates "an irreconcilable and fundamental conflict" in agency obligations).

Congress failed to adopt an earlier version of Section 318 that would have repealed these existing laws. Moreover, the section does not conflict in any way with or otherwise "occupy the field" of Forest Service and BLM decision-making for a year.

1. Section 318 contains no express repeal or other amendment of the environmental laws in these cases.

The Court will search all eleven subsections of Section 318 in vain for any express repeal or amendment of the environmental laws at issue in these cases with respect to Forest Service and BLM timber sales in spotted owl habitat during fiscal year 1990. Indeed, the absence of express language of repeal anywhere in Section 318 for the laws at issue in these cases stands in stark contrast to the use of *explicit* language of repeal for other laws. *See* Pet. App. at 1a (section 318(a)(1)) (timber sales to be offered "notwithstanding the provisions of the Federal Timber Contract Payment Modification Act of 1984"); *id.* at 8a (section (d)) ("Notwithstanding any other provision of law, there shall be not more than one level of administrative appeal"); *id.* at 9a (section (f)(1)) (certain fiscal year 1989 timber sales "shall not be subject to further judicial review by any court of the United States"); *id.* at 10a-11a (section (g)(1)) (repealing authority of courts to grant certain interlocutory remedies, and providing that "[t]he provisions of section 705 of title 5, United States Code, shall not apply to any challenge to such a timber sale").[31] Congress clearly knew how to repeal the existing

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[31] Subsection (a), which sets timber sale targets for the Forest Service and BLM, does not expressly repeal any laws that

laws when it wanted to, and chose to do so only for laws *other than* the environmental laws at issue in these cases during fiscal year 1990.

2. Section 318's legislative history makes clear Congress did not repeal or amend the existing laws in these cases.

The legislative history of Section 318 resolves any remaining question about whether Section 318 was directed at the courts (which it was) or was intended to repeal the existing laws at issue in these cases (which it was not). The conference report on Section 318 states unequivocally that:

> This section in no way alters application of the Endangered Species Act or other environmental laws to Forest Service and BLM management activities.

Br. Opp., App. at 122a. Congress' revision of the Senate version of Section 318 to eliminate language that *would have* repealed the laws at issue in these cases also confirms that the final version does not do so.

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regulate the selection of particular timber sales to meet this target. *See Gifford Pinchot Alliance v. Butruille*, 742 F. Supp. 1077, 1083 (D.Or. 1990). Similarly, subsections (b)(1) through (5) contain only statutory guidelines for the Forest Service and BLM to follow in carrying out the administrative task of selecting and preparing timber sales during fiscal year 1990. These guidelines certainly state no express repeal of any requirement of other laws that also govern agency selection of timber sales. Subsections (c) and (e), respectively, establish advisory committees to comment on timber sale selection and confirm the requirements of inter-agency cooperation under the Endangered Species Act. Like subsections (a) and (b), none of these subsections expressly repeals the laws at issue in these cases.

The original Senate version of Section 318 would have authorized timber sales "prepared, advertised, awarded and operated" during fiscal year 1990 "notwithstanding any provision of law that is the basis for any stay, restraining order or injunction issued in" these cases. *See* App. A at 6a. However, the strong opposition in the House of Representatives to these provisions in the Senate version of Section 318, *see* App. B, led the conference committee to rewrite the Senate's efforts to repeal the laws for these cases. Rather than barring challenges to fiscal year 1990 timber sales "notwithstanding any provision of law" raised in these cases, section 318(b)(6)(A) instructed the courts that Forest Service and BLM conduct "is adequate consideration for the purpose of meeting" those statutes.

Petitioners' contention that the final language of section 318(b)(6)(A) should be read to repeal the environmental laws, Pet. Br. at 20-22, the same outcome as the Senate language that Congress failed to adopt, cannot stand. As this Court has explained:

> Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.

INS v. Cardoza Fonseca, 480 U.S. 421, 442-43 (1987). *Accord, e.g., North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 528-29 (1982) (adoption of one version of competing language in conference committee indicates that it "prevailed for substantive reasons"); *Gulf Oil Corp. v. Copp Paving Co. Inc.*, 419 U.S. 186, 199-200 (1974) (deletion of a provision by a conference committee "militates against a judgment that Congress intended a result that it expressly declined to enact").

3. Section 318 does not occupy the field of Forest Service and BLM decisionmaking for fiscal year 1990.

Despite the absence of any specific language of repeal or amendment of the existing laws in Section 318, and despite the unequivocal evidence from the history of Section 318 that Congress did not intend to repeal or amend these laws, petitioners maintain that Congress "intended that Section 318's standards would preempt the field as to 1990 sales . . . . " Pet. Br. at 22. Petitioners, moreover, argue that an implied intent to amend or repeal existing laws can be found "without regard to the first sentence" of subsection (b)(6)(A). *Id.* at 20. Petitioners attempt no principled analysis to establish this point and they are wrong.[32] The provisions of Section 318 – other than subsection (b)(6)(A) – simply add temporary substantive and procedural guidelines for selecting timber sales during fiscal year 1990. These provisions complement, but do not supplant or conflict with, the requirements of the existing laws in these cases.

First, the government itself interpreted the timber sale targets of section 318(a) (providing that the Forest Service and BLM "shall offer" specified timber sale levels) as requiring consistency with other applicable laws. Far from supplanting or repealing those laws, section 318(a) simply set a timber sale "mark" or target that the Forest Service and BLM were to attempt to achieve while also meeting other applicable legal requirements. *See Gifford Pinchot Alliance v. Butruille*, 742 F.Supp. 1077, 1083 (D.Or. 1990) (upholding Forest Service position that

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[32] *See supra* note 30 (discussing framework for analyzing effects of one statute on another).

Section 318(a)'s timber targets did not require agency to disregard other environmental laws in offering fiscal year 1990 timber sales); *Gifford Pinchot Alliance v. Butruille*, 752 F.Supp. 967 (D. Or. 1990) (same conclusion following the Forest Service's actual failure to offer Section 318(a)'s target volume).

Similarly, nothing in subsections 318(b)(1) through (b)(5) conflicts with or eliminates agency discretion under the existing environmental laws. Instead, subsection (b)(3) places certain areas of the national forests off-limits to logging during fiscal year 1990.[33] Placing these areas off-limits, however, neither occupies the regulatory field generally nor creates a necessary conflict with existing laws and regulations that govern all Forest Service lands. The other guidelines of subsection (b) also do not occupy the field or conflict with the existing laws. These guidelines provide standards for protecting ecologically significant old growth forests *in addition to* the requirements of the existing laws to protect wildlife populations, water quality, and other environmental values. The Forest Service still must exercise its discretion under the existing laws and regulations – along with the complementary guidelines of subsection (b) – in selecting and preparing timber sales from areas of national forests other than those set aside by (b)(3) and (b)(5).

The NFMA and its regulations thus still require the Forest Service to "provide for diversity of wildlife species . . . . ," 16 U.S.C. § 1604(g)(3)(B), and to "maintain viable populations of native vertebrate species," 36 C.F.R. § 219.19. In order to meet this requirement, the Forest Service still must decide which combination of timber sales to select and prepare, outside the areas placed off-limits by section

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[33] *See supra* at 16-17 (discussing subsection (b)(3) guidelines)

318(b)(3), so that these sales, together with the areas protected by (b)(3) and other laws, will provide for "diversity of wildlife species" and "viable populations" of these species both during and after fiscal year 1990. The same is true for the other existing environmental laws at issue in these cases. The BLM still must practice "multiple use" management under the requirements of FLPMA. And both the Forest Service and the BLM still must meet NEPA's procedural mandate to consider and disclose the environmental consequences – including the consequences for wildlife species such as the spotted owl – of those timber sales they choose to sell during fiscal year 1990.[34]

In short, none of the provisions of Section 318 poses even an arguable conflict – much less an "irreconcilable" one, *Morton v. Mancari*, 417 U.S. at 550 – with the requirements of existing law. Section 318 also does not "occupy the field," Pet. Br. at 22, regulated by these laws, even for a year. Instead, the provisions of Section 318 complement and coexist with the requirements of existing laws. *Morton v. Mancari*, 417 U.S. at 551.

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[34] Nothing in Section 318, except subsection (b)(6)(A), addresses the application of the existing laws at issue in these cases to the activities of the Forest Service and BLM during fiscal year 1990. Nor does any provision of Section 318, except subsection (b)(6)(A), prevent the plaintiffs from asking the courts to review and decide whether these agencies' actions during the fiscal year meet the requirements of the existing laws. Only subsection (b)(6)(A) addresses these issues and it does so by telling the courts how to interpret and apply the law in these cases.

To be sure, under Section 318, as the court of appeals ruled, Pet. App. at 13a, the Forest Service and BLM may have to take actions *in addition to*, but not at odds with, the actions they might choose to take to comply with the existing laws. But the provisions of Section 318 simply do not instruct the Forest Service, explicitly or by implication, to forego providing for diversity of wildlife, including spotted owls.

C. Section 318(b)(6)(A) Usurps The Courts' Adjudicative Role In These Cases.

Petitioners concede, as they must, that Article III protects the federal courts' ability to exercise "adjudicative functions" in deciding cases properly before them. Pet. Br. at 17. The plain language of section 318(b)(6)(A) instructs the courts to decide these cases in favor of the government for one year. It does this quite simply by directing the courts to treat Forest Service and BLM actions that comply with one law – the requirements of subsections 318(b)(3) and (b)(5) – as actions that also comply with the separate and distinct requirements of the other, equally applicable laws that form the bases of plaintiffs' claims.

Nonetheless, petitioners contend that the specific identification of these cases in the subsection is an inconsequential form of legislative shorthand for the underlying statutes. Pet. Br. at 25. Petitioners also label the subsection a "deeming provision," as if the label could disguise the function of the statute. *Id.* at 25-28. But no matter which way petitioners turn, the plain language of section 318(b)(6)(A) blocks the path.[35]

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[35] Throughout their arguments, petitioners also refer to the "cardinal principle" that the courts should strive to construe statutes to avoid constitutional difficulties, as though this guide to statutory construction could empower the courts to redraft subsection (b)(6)(A) to avoid trouble. Of course, where, as here, the statute is clear, there is no saving construction available. To rescue subsection (b)(6)(A), the courts would need to write a different statute for Congress. The courts cannot do this. *See Heckler v. Mathews*, 465 U.S. at 741-42; *Aptheker v. Sec. of State*, 378 U.S. at 515.

1. The reference to these cases in subsection (b)(6)(A) is not simply a convenient shorthand.

Petitioners argue that "[t]he naming of the cases in the statute, although perhaps unusual, is . . . not materially different from enumerating the statutes themselves." Pet. Br. at 25. Not so. The identification of these cases in subsection (b)(6)(A) tells the courts which particular claims under NFMA, NEPA, the MBTA, and FLPMA – the ones in these cases – Congress was instructing the courts to resolve for fiscal year 1990. Congress simply did not address NFMA, NEPA, FLPMA and the MBTA generally in Section 318. Rather it took aim at the claims under these statutes in these cases. As the court of appeals correctly concluded, "[b]y section 318, Congress for the first time endeavors to instruct federal courts to reach a particular result in pending cases identified by caption and file number." Pet. at 9a.

2. Labelling subsection (b)(6)(A) a "deeming provision" does not change the operation of the statute.

Petitioners make a great deal of their designation of subsection (b)(6)(A) as a "deeming provision." Pet. Br. at 25-28, 37-38. But a statute in which Congress includes a "deeming provision" or a "species . . . of irrebuttable presumption," must be analyzed like any other statute to determine its operation and effect. Indeed, if labelling a statute a "deeming provision" ended the separation of powers inquiry, *United States v. Klein* would have been decided differently – the appropriations amendment at issue in that case was itself a "deeming" statute. *See Klein*, 80 U.S. (13 Wall.) at 143 (describing statute). If a "deeming" statute – or any other statute – violates the Constitution, it must be set aside; the label attached to the statute is not important.

In any event, the thirty-five "deeming" statutes petitioners cite in support of their "deeming" argument are not before the Court, and they are distinguishable from section 318(b)(6)(A) in several important respects. None of them specifies pending litigation or existing court orders, as subsection (b)(6)(A) does. None specifies that certain administrative actions "meet" the requirements of existing laws, as subsection (b)(6)(A) does. The legislative history of none of these provisions specifically disavows any intent to modify existing laws, as the legislative history for subsection (b)(6)(A) does.[36]

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[36] Even a cursory review of the statutory "deeming" provisions that petitioners catalogue reveals that many are inconsequential definitional provisions of a prospective and general nature which determine that certain categories of things should be governed by certain provisions of law. *See* Pub. L. No. 92-318, § 506(m), 86 Stat. 352 (1972) (requirements of state consent laws); Pub. L. No. 99-662, § 204, 100 Stat. 4099 (1986) (requirements of permits); Pub. L. No. 102-624, § 1736, 104 Stat. 3793 (1990) (signature requirements). Others are allocational housekeeping provisions providing that certain expenditures are deemed to be made under certain laws or budgetary provisions, or that certain officers are deemed to work for certain departments. *See* Pub. L. No. 89-554, § 1, 80 Stat. 425 (1966) (departmental location of officers); Pub. L. No. 98-473, 98 Stat. 1954 (1984) (budgeting allocation); Pub. L. No. 100-440, § 631, 102 Stat. 1759 (1988) (hospital discharges). None of these technical provisions affects the courts' ability to adjudicate particular cases or specific pending claims under existing laws, as subsection (b)(6)(A) does.

Twenty-nine of the thirty-five deeming provisions petitioners cite are from legislation adding lands to the National Wilderness Preservation System under the Wilderness Act, 16 U.S.C. § 1131 *et seq.* The constitutionality of these statutes, of course, is not at issue here. Moreover, these statutes address a fundamentally different situation than subsection (b)(6)(A).

Moreover, the mere fact that Congress may have followed a particular legislative path on many occasions before is not proof that the path complies with the Constitution. *See INS v. Chadha*, 462 U.S. at 945-46. Thus, even if petitioners' extensive catalogue of "deeming" provisions included some statutes that violate the separation of powers, a catalogue of other statutes does not make subsection (b)(6)(A) constitutional. A "deeming provision" that directs the courts how to decide a particular case under the existing laws, even temporarily, usurps the courts' power to decide the case, regardless of the provision's label. Such a provision is not substantively different from a statute in which Congress "deems" that the courts shall reject the plaintiffs' claims, or rule in the

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In the Wilderness Act amendments Congress accepts certain Forest Service documents as "adequate consideration of the suitability of such lands for inclusion" in the Wilderness system. *E.g.*, Pub. L. No. 101-401, § 2(b)(2), 104 Stat. 863, 846 (1990) (Maine wilderness); Pub. L. No. 96-560, § 107(b)(2), 94 Stat. 3265, 3270 (1980) (Colorado wilderness). These amendments, unlike section 318(b)(6)(A), do not identify specific pending cases. The legislative history of these amendments also does not contain any congressional disavowal of intent to modify existing law, as does section 318(b)(6)(A). Finally, the ultimate decision on wilderness designation rests with Congress, *not* the Forest Service. Congress can plainly state when it believes the Forest Service has performed an "adequate consideration" for Congress' purposes in reaching wilderness decisions. In contrast, the existing environmental laws require the Forest Service and BLM to comply with statutory requirements subject to judicial review. Section 318's "determin[ation] and direct[ion]" that Forest Service conduct "is adequate consideration for the purpose of meeting the statutory requirements" governing that action intrudes directly into the *judicial* – not the legislative – function.

government's favor, in a particular pending case.[37] In both situations, the courts are precluded from "giving the effect to evidence which, in [their] own judgment, such evidence should have, and [are] directed to give it" a different effect. *Klein*, 80 U.S. (13 Wall.) at 147.

3. Congress through Section 318(b)(6)(A) took the expedient course of simply deciding these cases for the courts during fiscal year 1990.

The central issue in this case is the effect of subsection (b)(6)(A) – regardless of its label – on the courts and their ability to apply existing laws to the facts presented in plaintiffs' cases. The plain language of the subsection tells the courts how to interpret and apply the existing, unrepealed and unamended environmental laws to plaintiffs' claims, regardless of how the courts might otherwise interpret and apply those laws, and regardless of the fact that the defendant federal agencies have engaged in and will continue to engage in the conduct challenged in the cases and regulated under the laws. As the court of appeals ruled, subsection (b)(6)(A) – "does not establish new law, but directs the courts to reach a specific result

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[37] Petitioners' hypothetical reformulations of section (b)(6)(A), Pet. Br. at 28 n. 20, are singularly unhelpful. As explained in the text, Congress' rejection of particular language ("notwithstanding any other provision of law") belies petitioners' contention that the court of appeals' analysis of the language actually adopted by Congress was "artificial." *Id.* Moreover, any other "hypothetical examples," *id.*, would properly be analyzed in the same fashion as section (b)(6)(A): Does the statute attempt to tell courts how to apply existing law in a particular case? If so, it violates the Constitution just as section (b)(6)(A) does.

and make certain factual findings under existing law in connection with two cases pending in federal courts." Pet. App. at 14a. This is indeed what "*Klein* and subsequent cases agree is constitutionally proscribed." *Id.*[38]

Any other conclusion would allow Congress to accomplish through indirect means (which usurp the powers of another branch of government) what for political reasons it chose not to accomplish through a general repeal or amendment of the existing laws. Indeed, here, Congress was unwilling to attempt even a limited repeal of the laws: it discarded a Senate version of Section 318 with limited but explicit language of repeal following strong protests from other members of Congress to such legislation. *See supra* at 13-15. Rather than face squarely a potentially difficult political controversy, Congress took a detour across the powers of the courts.

As this Court observed in *INS v. Chadha*, Congress' approach in section 318(b)(6)(A) "doubtless [was] in many respects a convenient shortcut." 462 U.S. at 958. Nonetheless,

> There is no support in the Constitution or decisions of this Court for the proposition that the

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[38] Petitioners argue that striking subsection (b)(6)(A) from Section 318 because it violates the separation of powers "distorts the congressional compromise" in Section 318. Pet. Br. at 31-33. Allowing the statute to stand, however, as a legislative exercise of judicial power to decide a particular case would distort the fundamental political compromise embodied in the Constitution – the allocation of separate powers to separate branches of government. A temporary political expedient – section 318(b)(6)(A) – to avoid a confrontation over the repeal or amendment of existing laws is no excuse for ignoring the Constitution. Whenever Congress acts contrary to constitutional standards, as it has here, the courts must inevitably "distort" a congressional compromise.

> cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided . . . .

Id. at 959 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). Congress cannot constitutionally adjudicate particular cases, even if (*particularly* if) changing the law would be politically difficult. Section 318(b)(6)(A) is an exercise of the "judicial Power" reserved to the courts in Article III of the Constitution and, as such, is unconstitutional.

CONCLUSION

For all of the foregoing reasons, the judgment of the court of appeals in these cases that section 318(b)(6)(A) violates the constitutional separation of powers should be affirmed.

Respectfully submitted,

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APPENDICES TO BRIEF OF RESPONDENTS SEATTLE AUDUBON SOCIETY, ET AL.

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APPENDIX A

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CONGRESSIONAL RECORD
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OF THE 101st CONGRESS, FIRST SESSION

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S 8775-76 CONGRESSIONAL RECORD –
SENATE July 26, 1989

SEC. 317. (a) From funds appropriated under this Act or otherwise made available –

(1) the Forest Service shall award, notwithstanding the provisions of the Federal Timber Contract Payment Modification Act of 1984 (16 U.S.C. 618 (a)(5)(C)), an aggregate timber sale level of 8 billion board feet of net merchantable timber from the national forests in Oregon and Washington for fiscal years 1989 and 1990. Such timber sales shall be consistent with legally valid land and resource management plans except, in the case of the Mapleton Ranger District of the Siuslaw National Forest, Oregon, shall be consistent with the preferred alternative of the draft land and resource management plan and accompanying draft environmental impact statement dated October 1, 1986: Provided, That of the 8 billion board foot aggregate timber sale level for fiscal years 1989 and 1990, timber sales awarded from the thirteen national forests in Oregon and Washington known to contain northern spotted owls shall meet an aggregate timber sale level for fiscal years 1989 and 1990 of 6 billion board feet of net merchantable timber; and

(2) the Bureau of Land Management shall award such volumes as are required in fiscal year 1990 to meet an aggregate timber sale level of 2 billion board feet for fiscal years 1989 and 1990 from its administrative districts in Western Oregon.

(b)(1) In accordance with subsection (b)(2) of this section, all timber sales from the thirteen national forests in Oregon and Washington known to contain northern spotted owls prepared pursuant to this section shall minimize fragmentation of the most potentially significant forest stands. "Potentially significant forest stands" are defined as meeting all the following criteria:

(A) that have at least eight trees per acre exceeding 300 years in age or 40 inches in diameter;

(B) that contain more than four snags per acre greater than 15 feet tall and greater than 24 inches in diameter; and

(C) that contain more than four downed trees per acre which are greater than 24 inches in diameter and are greater than 50 feet long.

(2) To the extent any fragmentation is necessary in order to meet the timber sale levels directed by subsections (a)(1) and (a)(2) of this section, the Forest Service and the Bureau of Land Management shall confine such fragmentation to the potentially significant forest stands which have been prioritized from the smallest to the largest on a forest-by-forest and district-by-district basis.

(3) The Forest Service is directed to thoroughly review the relationship between the minimal fragmentation criteria of subsections (b)(1) and (b)(2) of this section and the timber sales program for the Mr. Baker-Snoqualmie and Olympic

National Forests. If these forests are unable to meet their proportional share of the allowable sale quantity under the minimal fragmentation criteria, then the Forest Service shall consult with the advisory boards established under subsection (c) of this section and the U.S. Fish and Wildlife Service as established under subsection (e) of this section to identify timber sales to meet the proportional allowable sale quantity, and shall prepare, advertise, offer and award these identified sales. Nothing in this subsection shall be deemed to alter the relationship between the Forest Service and the United States Fish and Wildlife Service under the conferencing process established under section 7(a)(4) of the Endangered Species Act of 1973 (16 U.S.C. 1536(a)(4), as amended).

(c) The Secretaries of the Interior and Agriculture shall name advisory boards on a forest-by-forest and district-by-district basis which shall be comprised of not more than thirteen individuals who, in the appropriate Secretary's judgement, equally represent a diversity of views. The advisory boards shall be named not later than November 1, 1989. The advisory boards shall assist the Forest Service and Bureau of Land Management in reviewing prospective timber sales which shall meet the timber sale levels directed by this section prior to their award. The members of the advisory boards authorized by this section shall serve without compensation or reimbursement of expenses.

(d) Notwithstanding any other provision of law, there shall be not more than one level of administrative appeal of any decision by the Forest Service and the Bureau of Land Management to undertake any activity directed by this section for timber sales to be prepared, advertised, offered, and awarded during fiscal year 1990 from the thirteen national forests in Oregon and Washington and public lands in western Oregon

known to contain northern spotted owls. If an administrative stay is granted in any such appeal the Regional Forester or the Bureau of Land Management State Director shall issue a final decision on the merits within forty five days of the date of issuance of such stay.

(e) The United States Fish and Wildlife Service shall confer with the Forest Service and the Bureau of Land Management, and shall prepare and complete an advisory report which recommends to the Forest Service and the Bureau of Land Management criteria necessary to maintain the viability of the northern spotted owl. The Forest Service and Bureau of Land Management shall use, in their discretion, such of the criteria as they respectively deem appropriate in the preparation of timber sales on the thirteen national forests in Oregon and Washington known to contain northern spotted owls and public lands in western Oregon, respectively, during fiscal year 1990. Such report shall be completed and submitted to the Forest Service and Bureau of Land Management by November 1, 1989. The Forest Service and the Bureau of Land Management shall use this report, together with other relevant information, in the preparation, advertisement, offer, and award of the timber sales directed by this section.

(f)(1) If all parties to the lawsuits referenced in subsection (g)(1) of this section reach and enter into agreements accepted by the relevant courts not later than October 1, 1989, which allows the preparation, advertisement, offer, and award of at least 1 billion board feet of net merchantable timber from those timber sales enjoined on the national forests, and at least 250 million board feet of timber sales on Bureau of Land Management districts in western Oregon enjoined by the orders identified in subsection (g) (1) of this section, then such timber sales selected shall be prepared, offered, awarded and

operated and shall not be subject to further judicial review by any court of the United States.

(2) If the agreements specified in subsection (f)(1) of this section is reached, then those timber sales listed in the court orders referenced in subsection (g)(1) of this section but not identified in the agreement in subsection (f)(1) of this section are hereby voided and shall not be offered for resale in fiscal year 1990.

(g)(1) In accordance with the provisions of subsections (b)(1), (b)(2), (b)(3), and (e) of this section, the Forest Service and Bureau of Land Management for fiscal year 1990 shall identify timber sales for preparation, advertisement, offer and award, which may include timber sales from among those listed in the court order dated March 24, 1989, as amended, in the captioned case Seattle Audubon Society et al., v. F. Dale Robertson, Civil Number 89-160, consolidated with Washington Contract Loggers Assoc. et al., v. F. Dale Robertson, Civil Number 89-99 (order granting preliminary injunction); the opinion entered on May 18, 1989 in Portland Audubon Society et al., v. Manuel Lujan, Jr., Civil Number 87-1160-FR (order granting preliminary injunction), and shall consult with the parties of the aforementioned cases in identifying timber sales which were released so that the timber sale levels directed in subsections (a)(1) and (a)(2) of this section can be attained.

(2) After they are established, the Forest Service and Bureau of Land Management shall consider the recommendations of the advisory boards established pursuant to subsection (c) of this section regarding any timber sale to be awarded in fiscal year 1990 prior to the award of any subsequent timber sale. These recommendations shall be considered regardless of whether the agreements provided in subsection (f)(1) of this

section have been reached, entered into, and accepted by the relevant courts.

(h)(1) If all parties to the lawsuits referenced in subsection (g)(1) of this section fail to reach and enter agreements as provided in subsection (f)(1) of this section, then such timber sales selected pursuant to subsections (g)(1) and (g)(2) of this section shall be prepared, advertised, awarded and operated notwithstanding any provision of law that is a basis for any stay, restraining order or injunction issued in a proceeding identified in subsection (g)(1) of this section.

(2) The Forest Service and Bureau of Land Management shall, for each respective timber sale, lift its own stay or apply to the appropriate court for the lifting of the restraining order or injunction whose basis has been withdrawn by this section.

(i) No restraining order, injunction, or void of sale shall be issued by any court of the United States in fiscal year 1990 with respect to any decision to prepare, advertise, offer and award timber sales from the thirteen national forests in Oregon and Washington and public lands in western Oregon known to contain northern spotted owls. The provisions of section 705 of title 5, United States Code shall not apply to any challenge to such a timber sale.

(j) The Forest Service, the Bureau of Land Management, and the United States Fish and Wildlife Service shall submit reports updating their findings and progress as determined by the process established in subsection (e) of this section on a monthly basis to the President of the Senate and the Speaker of the House for appropriate referral. Such reports shall be submitted as directed beginning on December 1, 1989, and ending on September 30, 1990.

(k) This section applies solely to the thirteen national forests in Region Six and Bureau of Land Management districts in western Oregon known to contain northern spotted owls. Nothing contained in this section shall be construed to require the Forest Service or Bureau of Land Management to develop similar policies on any other forest or district in Oregon and Washington.

(l) The advisory committees established under this section shall not be subject to the Federal Advisory Committee Act (86 Stat. 770).

(m) The provisions of this section shall remain in effect until September 30, 1990.

APPENDIX B

Congress of the United States

House of Representatives

Washington, DC 20515

September 11, 1989

The Honorable Sidney R. Yates
Chairman
House Committee on Appropriations
Subcommittee on Interior and Related Agencies
Washington, D.C. 20515

Dear Chairman Yates:

In just a few days, members of the conference committee on the Interior Appropriations Bill for FY 1990 will face very important decisions regarding the future of our nation's forests. We, the undersigned Members of the House of Representatives, are deeply concerned about provisions of the bill which the Senate included regarding judicial review and the management of ancient forests. We believe that the language of the Interior Appropriations Bill as passed by the House on July 12 is a more reasonable approach to these matters, and that this language should be maintained during conference committee action.

The objectionable Senate provisions, collectively known as the Hatfield/Adams provision, effectively insulate the Forest Service and the Bureau of Land Management from judicial remedies imposed under the Endangered Species Act, the National Forest Management Act, the National Environmental Policy Act, the Clean Water Act and any other federal law. This insulation is contrary to our concept of justice because it will

limit the ability of citizens to obtain judicial remedies to illegal agency activities.

The Hatfield/Adams amendment threatens to remove administrative decisions – no matter how illegal – from effective judicial remedies. In addition, this insulation of agency activities has not been subject to the scrutiny of the authorizing committees with appropriate jurisdiction over the management of our nation's forest and wildlife resources.

Finally, we are concerned because the provision mandates an unsustainably high timber sales target, which will undercut all of the ancient forest protection measures attempted in the bill. Even regional Forest Service officials readily admit that this high volume cannot be maintained without violation of sustained yield forestry principles and Fish and Wildlife Service criteria to protect the spotted owl.

We therefore urge the conference committee to retain the relevant forestry sections of the House version of the Interior Appropriations Bill during its upcoming deliberations on this bill.

Sincerely,

/s/ _____

Jim Bates
Howard L. Berman
James H. Bilbray
Sherwood L. Boehlert
David E. Bonior
Robert A. Borski
Rick Boucher
Barbara Boxer
George E. Brown
John Bryant
Benjamin L. Cardin
Thomas R. Carper

William Clay
John Conyers Jr.
Jim Cooper
George W. Crockett
Robert W. Davis
Ronald V. Dellums
Thomas J. Downey
Richard J. Durbin
Roy Dyson
Don Edwards
Eliot L. Engel
Mike Espy
Dante B. Fascell
Edward F. Feighan
Barney Frank
Sam Gejdenson
Dan Glickman
Porter Goss
Tony P. Hall
Augustus F. Hawkins
Charles A. Hayes
Peter Hoagland
George Hochbrueckner
William J. Hughes
Andrew Jacobs Jr.
Tim Johnson
Harry Johnston
Jim Jontz
Marcy Kaptur
Robert Kastenmeier
Dale E. Kildee
Gerald D. Kleczka
Peter H. Kostmayer
Tom Lantos
Jim Leach
Sander Levin
Mel Levine
John Lewis
Jill Long
Edward J. Markey
Matthew G. Martinez
Frank McCloskey
Thomas McMillen
Kweisi Mfume
George Miller
Jim Moody
Constance Morella
Bruce A. Morrison
Robert J. Mrazek
Dave Nagle
Bill Nelson
Major Owens
Wayne Owens
Frank Pallone
Donald J. Pease
Nancy Pelosi
Timothy J. Penny
John E. Porter
Arthur Ravenal
Robert A. Roe
Edward R. Roybal
Patricia Saiki
Thomas C. Sawyer
Jim Saxton
James H. Scheuer
Claudine Schneider
Patricia Schroeder
Charles Schumer
Christopher Shays
Gerry Sikorski
David E. Skaggs
Jim Slattery

Louise M. Slaughter
Peter Smith
Robert C. Smith
Lawrence J. Smith
Stephen Solarz
Fortney Stark
Michael D. Synar
Robin Tallon
Esteban Torres
Edolphus Towns
Bob Traxler
Bruce F. Vento
Peter J. Visclosky
Doug Walgren
Ted Weiss
Alan Wheat
Robert E. Wise Jr.
Howard Wolpe